No. 87-1216

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

ARTHUR YOUNG & COMPANY,
Petitioner,

- v. -

ROBERT BURULL AND JEANNE BURULL,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

CARL D. LIGGIO
JOHN MATSON
Counsel of Record
ROBERT G. COHEN
ARTHUR YOUNG & COMPANY
277 Park Avenue
New York, New York 10172
(212) 407-2358

Of Counsel:
LAWRENCE C. BROWN
THOMAS H. BENNIN
MARK D. SAVIN
FAEGRE & BENSON
2300 Multifoods Tower
33 South Sixth Street
Minneapolis, MN 55402
(612) 371-5300

Attorneys for Petitioner Arthur Young & Company

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INTRODUCTION

Rule 11 of the Federal Rules of Civil Procedure, which governs pleadings and motions, and 28 U.S.C. § 1927, which regulates generally the conduct of counsel in litigation, can together be powerful weapons to control all objectively unreasonable conduct in federal court litigation *if* they are invoked vigorously and uniformly.

This petition of Arthur Young & Company presents the Court with the opportunity to correct the lax and erroneous application below of both provisions and to speak to the lower federal courts and the federal trial bar

on the importance of the vigorous and uniform application of both.

ARGUMENT

I.

SANCTIONS MUST BE APPLIED WHERE, AS HERE, A VIOLATION OF RULE 11 HAS BEEN FOUND

The courts below found that respondents violated rule 11 in pleading two claims that had no legal basis and one with no factual support.[1] However respondents may seek to minimize those findings,[2] they undeniably indict, as violative of rule 11, the heart of respondents' pleading -- three of their four securities law claims, which provided the only basis for federal court jurisdiction.

Rule 11 says: "If a pleading . . . is signed in violation of this rule, the court . . . shall impose . . . an appropriate sanction." The question before this Court is

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1 *See* Appendix to Petition for Certiorari ("App.") at B5, 11 (the trial court found that respondents' claims under sections 12(2) and 17(a) of the Securities Act of 1933, 15 U.S.C. § 77l(2) & q(a), "on their face, lacked merit," were "the subject of a sanction," and constituted "the technical violation of Rule 11."); A23 (the Eighth Circuit noted "the frivolousness of the allegation that Arthur Young had participated from the outset in a violation of § 10(b). . . .").

2 *See* Brief of Respondents at 4 ("The district court found only a 'technical' violation of Rule 11 . . ., which would not support Rule 11 sanctions. Hence, no Rule 11 violation has been found by the lower courts."); 7 (under Arthur Young's argument, "every pleading peccadillo would violate Rule 11 and sanctions thereby mandated.") and 9 ("[T]he violation was *de minimus* only and, accordingly, the violation does not support a sanction award under Rule 11.").

whether the rule means what it says -- that sanctions are mandatory when the rule is violated -- as four circuits and one panel of another hold, or whether the Eighth Circuit and a different panel of the Ninth are correct that sanctions are appropriate only when the entire pleading "itself is frivolous." *Burull v. First Nat'l Bank of Minneapolis*, 831 F.2d 788, 789 (8th Cir. 1987), App. A at A4, quoting *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540 (9th Cir. 1986).

Since this petition was filed the conflict among the circuits has deepened over the question of whether an entire pleading must be frivolous before sanctions under rule 11 must be imposed. The Fifth Circuit in *Thomas v. Capital Sec. Serv., Inc.*, No. 86-4480 (5th Cir. Jan. 21, 1988) (*en banc*), has joined the First (*see Quiros v. Hernandez Colon*, 800 F.2d 1 (1st Cir. 1986)),[3] the Second (*see Tedeschi v. Smith Barney, Harris Upham & Co.*, 757 F.2d 465 (2d Cir.), *cert. denied*, 474 U.S. 850 (1985)),[4] and the Seventh Circuits (*see, e.g., Frantz v. United States Powerlifting*

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[3] Respondents' effort to distinguish *Quiros* is unavailing because the First Circuit in that decision spoke directly to rule 11 in saying, "[W]e find no abuse of discretion," 800 F.2d at 3, in the imposition of sanctions where "the complaint contained both non-frivolous and frivolous claims." *Id.* at 2.

[4] Respondents argue that *Tedeschi* is not in conflict with *Golden Eagle* and *Burull* but they concede that one of the claims in *Tedeschi* was not frivolous. Thus, *Tedeschi* places the Second Circuit with those courts that, contrary to *Golden Eagle* and *Burull*, do not require that the entire complaint be frivolous before rule 11 may be invoked. *See* Petition for Certiorari at 9-10.

Fed'n, Nos. 87-1149 & 87-1223 (7th Cir. Dec. 31, 1987),[5] in ruling that where, as in the present case, a court finds "conduct to be violative of Rule 11, that court must then fashion an appropriate sanction in accordance with the dictates of Rule 11." *Thomas*, slip op. at 27. The Fifth Circuit added,

> There are no longer any 'free passes' for attorneys and litigants who violate Rule 11. Once a violation of Rule 11 is established, the rule mandates the application of sanctions. This appears to be the only construction consistent with the plain language of the rule.

Thomas, slip op. at 27.

Similarly, a panel of the Ninth Circuit in *Hudson v. Moore Business Forms, Inc.*, 827 F.2d 450, 456 (9th Cir. 1987), ruled in manner probably at odds with *Golden Eagle* and certainly at odds with the Eighth Circuit reading of that case: "[W]e do not believe that any number of sound

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5 Respondents attempt to distinguish a line of Seventh Circuit decisions supporting Arthur Young's position by singling out one phrase in one of the cases, *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073 (7th Cir.), *petition for cert. filed*, 56 U.S.L.W. 3416 (U.S. Nov. 20, 1987) (No. 87-828), which contrasts "serious" and "foolish" motions for sanctions, *id.* at 1084, and by trying to transform that comment into a holding that sanctions are not mandatory when rule 11 is violated. *See* Brief of Respondents at 7. Not only does *Szabo* not support respondents, but they totally ignore the Seventh Circuit decision which Arthur Young quoted at length for the proposition that "[r]ule 11 applies to *all* statements in papers it covers." *Frantz v. United States Powerlifting Fed'n*, (Nos. 87-1149 & 87-1223), slip op. at 8 (7th Cir. Dec. 31, 1987) (emphasis added), quoted in Petition for Certiorari at 10 n.6.

substantive theories explored in the pleadings excuse attorneys for providing reasonable legal and factual support for a damage claim."

Respondents attempt to add the Third Circuit to the courts which require that an entire complaint must be frivolous before rule 11 sanctions may be imposed. *See* Brief of Respondents at 6, quoting *Gaiardo v. Ethyl Corp.*, 835 F.2d 479 (3d Cir. 1987). If they were correct, that would only demonstrate even more sharply the split among the circuits, but *Gaiardo* never reached the issue and the Third Circuit has, in fact, not yet spoken on the question which this petition presents to this Court.

Thus, the split among the circuits has intensified as to whether an entire pleading must be frivolous before rule 11 applies and as to whether a finding of a violation of rule 11 -- whether as to all or a part of a pleading -- mandates the imposition of sanctions. Now is the time for this Court to resolve that conflict and impress the mandatory nature of rule 11 on the lower federal courts and the federal trial bar.

II.

SANCTIONS MUST BE APPLIED UNDER 28 U.S.C. § 1927 WHERE, AS HERE, OBJECTIVELY ABUSIVE CONDUCT HAS BEEN FOUND

In this case the trial court made specific findings as to the conduct of respondents' trial counsel which, by any

objective standard, was unreasonable and vexatious.[6] Respondents contend that this conduct does not reflect "a 'clear showing of bad faith' in order for the penal sanctions of § 1927 to attach." Brief of Respondents at 11, quoting *Kamen v. American Tel. & Tel. Co.*, 791 F.2d 1006, 1016 (2d Cir. 1986).

If, as we argue, section 1927 mandates the application of an objective standard of reasonableness similar to the objective standard applied under rule 11, *see* Petition for Certiorari at 11-12, that standard was clearly violated by respondents' trial counsel.[7] If there are cases, as respondents suggest, which apply a "bad faith" standard, this Court should resolve that conflict, reject such a subjective standard, and make clear that section 1927 requires the application of an objective standard of reasonableness. In this way both section 1927 and rule 11 will operate under a common, uniform and objective standard by which both trial conduct and pleadings and motions may be judged.

CONCLUSION

For the reasons stated above and in the Petition for Certiorari, Arthur Young & Company respectfully

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[6] *See* App. B at B6; Petition for Certiorari at 12.

[7] Respondents argue that this issue cannot be evaluated without reference to a trial transcript, which none of the parties obtained in this case. Brief of Respondents at 11-12. The trial court made very specific findings of misconduct which were never challenged by respondents or their trial counsel. Thus, no trial transcript is necessary to establish the unreasonableness of counsel's conduct.

requests that a writ of certiorari be issued to the Eighth Circuit and that this Court reverse the decision of that court in this case.

Dated: February 26, 1988
New York, New York

Respectfully submitted,

CARL D. LIGGIO
JOHN MATSON
Counsel of Record
ROBERT G. COHEN
ARTHUR YOUNG & COMPANY
277 Park Avenue
New York, New York 10172
(212) 407-2358

Of Counsel:
LAWRENCE C. BROWN
THOMAS H. BENNIN
MARK D. SAVIN
FAEGRE & BENSON
2300 Multifoods Tower
33 South Sixth Street
Minneapolis, MN 55402
(612) 371-5300

Attorneys for Petitioner Arthur Young & Company